

**STB Investors, Ltd. d/b/a Troy Hills Nursing Home  
and Local 1115-New Jersey-North, SEIU, AFL-  
CIO, CLC. Case 22-CA-22631**

September 30, 1998

**DECISION AND ORDER**

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on April 4, 1998,<sup>1</sup> the Acting General Counsel of the National Labor Relations Board issued a complaint on June 4, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 22-RC-11473. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint.

On July 10, 1998, the Acting General Counsel filed a Motion for Summary Judgment. On July 14, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On August 3, 1998, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

In its amended answer and response the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the ground that the Board improperly found that the unit LPNs are not statutory supervisors. In addition, the Respondent in its amended answer denies that the information requested by the Union is necessary and relevant.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Our dissenting colleague asserts that the Board incorrectly denied review in the underlying representation

case. Because he believes that the Board is obligated to "give each record a full and careful review" in cases raising issues regarding the supervisory status of charge nurses, he would not grant the Motion for Summary Judgment. In denying review in the representation case, however, we determined that the Respondent had identified no substantial issue either of fact or of law regarding the Regional Director's determination, after his review of the record, that the RN and LPN charge nurses in this case are not supervisors. To reverse our determination at this stage would be contrary to our long-settled policy not to allow the parties to relitigate representation case issues in "test of certification" unfair labor practice proceedings, absent newly discovered or previously unavailable evidence or special circumstances. *Pittsburgh Plate Glass*, supra.

Further, our dissenting colleague selectively cites the decisions of the Fourth and Sixth Circuits. He fails to acknowledge that the Board's position on the supervisory status of charge nurses has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enf. 323 NLRB No. 200 (1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enf. 322 NLRB No. 54 (Oct. 15, 1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enf. 321 NLRB No. 100 (July 10, 1996) (not reported in Board volumes).

Moreover, in *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1997), also cited by our dissenting colleague, the Third Circuit Court of Appeals specifically stated that it was "not creating a per se rule that LPNs are supervisors." 149 F.3d at 249. Further, that case is factually distinguishable as the nurses there had the disciplinary authority to send aides home for flagrant misconduct, including resident abuse, and to resolve minor problems or "gripes" over matters covered by the aides' collective bargaining agreement. In the instant case, the Regional Director specifically found that the nurses "do not have the authority to issue any serious discipline to other staff" and that there is "no evidence" of authority to suspend employees or adjust their grievances.

Finally, we also find there are no factual issues warranting a hearing regarding the Union's request for information. The complaint alleges that the Union requested the following information from the Respondent:

1. A list of all bargaining unit employees arranged by classification and shift including names, addresses, phone numbers, present wage rates, date and amount of last wage increase, date of hire and average number of hours worked per week that each has worked during the last 12 months.

<sup>1</sup> Although the Respondent's amended answer to the complaint denies that the charge was filed and served on the Respondent on April 4, 1998, a copy of the charge and letter notifying the Respondent of the charge is attached to the motion for summary judgment, and the Respondent has not challenged the authenticity of those documents in response to the Notice to Show Cause.

2. The total number of overtime hours paid each employee for the last 12 months.
3. The total gross pay for each bargaining unit employees for the last calendar year.
4. A copy of the staffing patterns or schedules for all units including a shift-by-shift breakdown for each classification in each unit as well as the staffing patterns on weekends per unit.
5. A copy of all current job descriptions.
6. A copy of all current work rules.
7. A copy of all policies related to employment conditions and employees' benefits including a copy of all employee handbooks and manuals.
8. Copies of any Summary Plan Description Booklets or materials for all insurance plans including premium rates and contribution rates for all coverages for each of last three years; and Pension Plans.
9. Names of employees enrolled in each insurance category (employee only, employee plus 1, family, etc.) for each Insurance Plan and Pension Plan.
10. A copy of the Medicare and Medicaid cost computation sheet prepared for the last two years and submitted to the State Department of Health; any response made thereto; issuance of any memorandum which sets forth the reimbursement rate established, changed or promulgated which rate in effect during said two year period.

With the exception of the Medicare and Medicaid cost and reimbursement information requested in paragraph 10, the foregoing types of information are clearly presumptively relevant for purposes of collective bargaining and must be furnished on request.<sup>2</sup>

Accordingly, we grant the Motion for Summary Judgment and will order the Respondent to bargain and to furnish the requested information, with the exception of

<sup>2</sup> See *Maple View Manor*, 320 NLRB 1149 (1996); *Trustees of Masonic Hall*, 261 NLRB 435 (1982); and *Mobay Chemical Corp.*, 233 NLRB 109 (1977). The Medicare and Medicaid cost and reimbursement information requested in paragraph 10 appears to seek financial information. The Board has held that financial information is not presumptively relevant and that the union must therefore demonstrate the relevance of the information. See *Dexter Fastener Technologies*, 321 NLRB 612, 613 fn. 2 (1996), and cases cited there. Here, the Union did not specify in its request why it wanted the Medicare and Medicaid cost and reimbursement information, and neither the complaint nor the motion for summary judgment explain why the Respondent had an obligation to provide the information. Cf. *Taylor Hospital*, 317 NLRB 991 (1995); and *Orthodox Jewish Home for the Aged*, 314 NLRB 1006 (1994) (finding that employer had duty to provide union with similar Medicare and Medicaid cost and reimbursement records given employer's statements during negotiations regarding the need for layoffs to remain financially healthy or the uncertainty about its sources of revenue). We therefore deny the Acting General Counsel's Motion for Summary Judgment with respect to the information requested in paragraph 10, and decline to order the Respondent to provide that information.

the Medicare and Medicaid cost and reimbursement information requested in paragraph 10.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Parsippany, New Jersey, has been engaged in the operation of a nursing home providing inpatient medical care. During the 12 month period preceding the issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000 and purchased goods valued in excess of \$5000 which were received by the Respondent at its Parsippany, New Jersey facility directly from points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Certification*

Following the election held January 14, 1998, the Union was certified on February 10, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All technical employees including all licensed practical nurses employed by the Employer at its Parsippany, New Jersey facility, excluding all professional employees including registered nurses and charge nurses, all other non-professional employees, office clerical employees, guards and supervisors as defined by the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

###### B. *Refusal to Bargain*

By letters dated February 24 and March 16, 1998, the Union requested the Respondent to furnish certain necessary and relevant information, and since about February 24, 1998, the Respondent has refused to furnish that information or to recognize and bargain with the Union as the exclusive bargaining representative of the unit. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

##### CONCLUSION OF LAW

By refusing on and after February 24, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent

has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested, with the exception of the Medicare and Medicaid cost and reimbursement information requested in paragraph 10.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

#### ORDER

The National Labor Relations Board orders that the Respondent, STB Investors, Ltd. d/b/a Troy Hills Nursing Home, Parsippany, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 1115-New Jersey-North, SEIU, AFL-CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All technical employees including all licensed practical nurses employed by the Employer at its Parsippany, New Jersey facility, excluding all professional employees including registered nurses and charge nurses, all other non-professional employees, office clerical employees, guards and supervisors as defined by the Act, and all other employees.

(b) Furnish the Union the information that it requested on February 24 and March 16, 1998, with the exception

of the Medicare and Medicaid cost and reimbursement information requested in paragraph 10.

(c) Within 14 days after service by the Region, post at its facility in Parsippany, New Jersey, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 24, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I dissented from the denial of the Employer's Request for Review of the Regional Director's Decision and Direction of Election, in which he found that the Employer's registered nurses and licensed practical nurse were not supervisors within the meaning of the Act. Review of the record was initially denied and here, effectively, review continues to be denied. In light of the close scrutiny of the Board's decisions in this area by the courts, I believe it both appropriate and essential that where, as here, significant issues have been raised, the Board give each record a full and careful review. See e.g., *Altercare of Hartville v. NLRB*, 129 F.3d 365 (6th Cir. 1997), denying enf. 321 NLRB 847 (1996); *Fair Oaks Health Care Center v. NLRB*, 148 F.3d 638 (6th Cir. 1998), denying enf. 323 NLRB No. 60 (1997) (not reported in Board volumes); *Cedar Ridge Nursing Rehabilitation Center v. NLRB*, 147 F.3d 333 (4th Cir. 1998), denying enf. 322 NLRB No. 29 (Sept. 20, 1996) (not reported in Board volumes); *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1998).

Accordingly, I dissent here from the granting of the Acting General Counsel's motion for summary judgment

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in this certification-testing proceeding and the findings that the Employer violated Section 8(a)(5) and (1) of the Act.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 1115-New Jersey-North, SEIU, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All technical employees including all licensed practical nurses employed by us at our Parsippany, New Jersey facility, excluding all professional employees including registered nurses and charge nurses, all other non-professional employees, office clerical employees, guards and supervisors as defined by the Act, and all other employees.

WE WILL furnish the Union the information it requested on February 24 and March 16, 1998, with the exception of the Medicare and Medicaid cost and reimbursement information requested in paragraph 10.

STB INVESTORS, LTD. D/B/A TROY  
HILLS NURSING HOME